

SUBRAMANIAM VYTHILINGAM

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v.

THE HUMAN RIGHTS COMMISSION OF MALAYSIA
(SUHAKAM) & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S5-21-82-2002]
17 FEBRUARY 2003

ADMINISTRATIVE LAW: *Exercise of administrative powers - Discretion - Human Rights Commission of Malaysia - Holding of inquiry into alleged human rights abuses - Whether within absolute discretion of Commission - Judicial intervention by court - Whether not allowable - Suit by private litigant to order Commission to hold inquiry - Whether not actionable - Human Rights Commission of Malaysia Act 1999, ss. 4, 12, 14*

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CIVIL PROCEDURE: *Action - Commencement - Action for injunctive relief and damages against Human Rights Commission of Malaysia - Whether grounded upon public law - Whether must proceed by way of judicial review - Action by way of originating summons - Whether flawed - Whether an abuse of process - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), O. 53 - Human Rights Commission of Malaysia Act 1999, ss. 4, 12, 14*

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Sometime in March 2001, one Kampung Medan was besieged with violence in which several lives were lost. The plaintiff alleged that the defendants ('Suhakam'), in breach of its statutory duty, had failed to conduct an inquiry into the incident, and in the circumstances, applied for orders that Suhakam comply with ss. 4 and 12 of the Human Rights Commission of Malaysia Act 1999 ('the Act') and for damages of RM50 million *vide* originating summons dated 17 April 2002 ('encl. (1)'). By summons in chambers dated 29 May 2002, Suhakam applied to strike out encl. (1) pursuant to O. 18 r. 19(1)(a),(b) and/or (d) Rules of the High Court 1980 ('RHC'), as well as under the inherent jurisdiction of the court ('encl. (4)'). Some four months into the hearing of encl. 4, the plaintiff raised an objection that encl. (4) was procedurally flawed, as limbs (a) and (b) of O. 18 r. 19 herein had been cumulatively added together, notwithstanding that they were disjunctive in nature. The procedural objection aside, Suhakam argued that encl. 4 ought to be allowed as the plaintiff's cause of action, if any, lay in public law remedies, and that the plaintiff, rightly, ought to have proceeded by way of judicial review under O. 53 of RHC, and

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- a* not by way of originating summons. It was further averred that the plaintiff, having suffered no personal injury or financial losses as a result of the incident, had no *locus standi* to institute the present suit.

Held:

- b* [1] The plaintiff did not raise the procedural objection within reasonable time and must be taken to have waived the right to raise the same. The plaintiff simply allowed 4 1/2 months to lapse after encl. 4 came up for hearing before proceeding to raise the objection. The lackadaisical attitude of the plaintiff must have attracted the provisions of O. 2 r. 2(1) of the RHC. (p 185 b)
- c*
- d* [2] Section 14 of the Act gives the requisite mandatory powers to Suhakam for purposes of conducting an inquiry under the Act. However, it is entirely up to Suhakam to decide whether or not it should hold an inquiry. Bearing in mind s. 12 of the Act, the court cannot interfere with the discretion if Suhakam decides not to hold an inquiry. (p 201 d)
- e* [3] It is apparent that the plaintiff's cause of action is grounded in public law and not on private law, since the prayers were in the nature of a *mandamus* and ancillary orders. Under O. 53 RHC leave of the High Court must first be obtained before the plaintiff could file his application for these orders. (pp 201 g-h & 202 e)
- f* [3a] The plaintiff should have pursued his public law remedy through judicial review proceedings under O. 53 RHC and not by way of an originating summons. By not pursuing the remedy through O. 53, the plaintiff was deliberately attempting to get around the stringent requirements enumerated in O. 53 RHC, including *inter alia* the need to serve the leave application on the Attorney General's Chambers. Enclosure (1) thus constituted an abuse of the process of the court and ought to be struck out. (p 203 b-g)
- g* [4] The plaintiff has not averred that he has suffered any injury or that he has suffered financial loss arising from the incident. He was not even one of the ten individuals who had lodged police reports in regard to the incident. Indeed, he had filed encl. (1) in the 'public interest' and on behalf of others who were unidentified. Not having suffered any injury peculiar to himself, the private right of the plaintiff has not been infringed
- h* and he too has not suffered any special damage. The plaintiff therefore has no *locus standi* and the originating summons must on this ground fail. (p 208 f-h)

[Procedural objection overruled. Originating summons struck out.]

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Case(s) referred to:

- Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54 HC (**refd**) **a**
- Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339 HC (**refd**)
- Annison v. District Auditor for St Pancras BC* [1962] 1 QB 489 (**refd**)
- B v. B* [1961] 2 All ER 396 (**refd**)
- Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (**refd**) **b**
- Berry v. British Transport Commission* [1962] 1 QB 306 (**refd**)
- Broughton v. Commissioner of Stamp Duties* [1899] AC 251 (**refd**)
- Chapman v. Michaelson* [1908] 2 Ch 612 (**refd**)
- Corporation of Toronto v. Russell* [1908] AC 493 (**refd**)
- Dato' Mak Kok & Anor. v. See Keng Leong & Ors* [1990] 1 CLJ 71; [1990] 1 CLJ (Rep) 790 HC (**refd**) **c**
- Development & Commercial Bank Bhd v. Astrid Jorunn Saniman* [1991] 1 MLJ 435 HC (**refd**)
- Disher v. Disher* [1965] P 31 (**refd**)
- Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550 HC (**refd**) **d**
- East India Co. v. Paul* [1849] 7 Moo PC 85 (**refd**)
- Ee Kim Kin v. Collector of Land Revenue* [1967] 2 MLJ 89 (**refd**)
- Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12 (**refd**)
- Great Eastern Ry. Co. v. Goldsmid* [1884] 9 App Cas 927 (**refd**)
- Haque v. Deputy Governor of Parkhurst Prison & Ors, Weldon v. Home Office* [1991] 3 All ER 733 (**refd**) **e**
- Howard v. Bodington* [1877] 2 PD 203 (**refd**)
- Hu Sepang v. Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC (**refd**)
- Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394 HC (**refd**) **f**
- Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64 FC (**refd**)
- Lee v. Bude, etc, Ry* [1871] LR 6 CP 576 (**refd**)
- Liverpool Borough Bank v. Turner* [1860] 2 De GF (**refd**)
- Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997 FC (**refd**) **g**
- Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 4 CLJ 558 HC (**refd**)
- Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Lain-lain* [2000] 2 CLJ 601 HC (**refd**)
- Markham v. Stanford* [1863] 14 CB (N5) 376 (**refd**)
- Mohammad Idres Mohd Sulaiman Shah v. Malayan Banking Bhd* [2001] 5 CLJ 308 HC (**refd**) **h**
- O'Reilly & Ors v. Mackman & Ors* [1983] 2 AC 237 (**refd**)
- Pacific Inter-Link Sdn Bhd v. Pemilik Kapal Atau Vesel 'MAKATSARIJA'* [2000] 2 CLJ 679 HC (**refd**)

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- a** *Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237 HC (**refd**)
R v. Barlow [1693] Carth 293 (**refd**)
R v. Bristol Cpn Ex p Hendy [1974] 1 WLR 503 (**refd**)
R v. Churchwardens of All Saints, Wigan [1876] 1 App Cas 611 (**refd**)
R v. Garland [1879] LR 5 QB 269 (**refd**)
- b** *R v. Inhabitants of Derby* [1694] Skin 370 (**refd**)
R v. Justices of West Riding of Yorkshire [1815] 3 M (**refd**)
R v. Leeds to Liverpool Canal Co [1840] 11A & E 316 (**refd**)
R v. Poplar Borough Council, ex p London County Council (No. 2) [1922] 1 KB 95 (**refd**)
- c** *Raja Segaran Krishnan v. Bar Malaysia & Ors* [2000] 4 CLJ 847 HC (**refd**)
Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC (**refd**)
Re Baker [1890] 44 Ch D 262 (**refd**)
Re Wolverhampton Borough Councils Aldermanic Election [1962] 2 QB 460 (**refd**)
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 HC (**dist**)
- d** *Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 HC (**refd**)
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 CA (**refd**)
Stylo Shoes v. Prices Tailors [1960] 2 WLR 8 (**refd**)
Tan Chye Choo & Ors v. Chong Kew Moi [1970] 1 MLJ 1 (**refd**)
- e** *Tan Eng Chiang & Anor v. OCBC Bank (Malaysia) Bhd* [1998] MLJU 495 HC (**refd**)
Universal Cargo Carriers v. Citati [1957] 1 WLR 979 (**refd**)
X and others (minors) v. Bedfordshire County Council, M (a minor) and Another v. Newham London Borough Council and Others, E (a minor) v. Dorset County Council and Other Appeals [1995] 3 All ER 353 (**refd**)
- f** *Yahya Kassim v. Government of Malaysia & Anor* [1998] 1 CLJ 43 CA (**refd**)
Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1999] 5 MLJ 180 HC (**refd**)

Legislation referred to:

- Federal Constitution, arts. 5, 8
- g** Human Rights Commission Of Malaysia Act 1999, ss. 3(2), 4(2)(b), (c), (e), 5(1), (2), (3), (4), 12(1), 14(1), 18(1), 19, 21
 Police Act 1967, ss. 3, 31
 Rules of the High Court 1980, O. 1A, O. 2 rr. 2(1), 3, O. 7, O. 18 r. 19(1)(a), (b), (c), (d), O. 41 r. 5(1), O. 53 r. 1A
- h** Specific Relief Act 1950, ss. 44(2), 45
 Bankruptcy Act 1883 [UK], s. 125(4)
 Local Government Act 1933 [UK], sch 3, part II, para 3(1)
 Poor Relief Act 1662 [UK], s. 18

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Other source(s) referred to:

Clerk & Lindsell On Torts, 17th edn, pp. 559, 560, 562, 567-569, 569-570

For the plaintiff - Manoharan Malayalam; M/s M Manoharan & Co

For the defendants - Cecil Abraham (Dhinesh Bhaskaran); M/s Shearn Delamore & Co

[The plaintiff has appealed to the Court of Appeal vide Civil Appeal No: W-02-225-03]

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Background Facts

Sometime in March 2001, violence broke out in Kampung Medan – a predominantly Indian area. It hit the headlines of most newspapers in the country. That violence took its toll. A number of individuals died or were injured. The victims were said to be of Indian origins and Mr. M. Manoharan, the learned counsel for the plaintiff, saw it fit to describe those unfortunate victims as Tamils. Whatever one uses to describe those victims, it makes not a whit of a difference. We are concerned here about human lives. Precious human lives. Fortunately, the police quelled that violence and everything is back to normal.

The violence that broke out in Kampung Medan received the attention of a non-governmental organisation by the name of “Parti Reformasi Insan Malaysia” – “PRIM” for short. On 30 March 2001, PRIM handed a memorandum to the first defendant – hereinafter referred to as “Suhakam”, and that memorandum entitled “Tiada Perlindungan Polis Untuk Masyarakat India Di Kampung Lindungan Dua Kawasan Persekitarannya” and that memorandum too was in relation to the Kampung Medan incident. Briefly, that memorandum carried the message that the police had failed to respond to the Kampung Medan incident in an appropriate manner and to provide protection to the Indian community.

The second to the sixth defendants are individuals and they are members of Suhakam at the material time. I would like to mention their names in quick succession. The second defendant would be Tan Sri Musa Hitam, a former Deputy Prime Minister, and who held the position of chairman of Suhakam.

- a* The third defendant is Tan Sri Harun Hashim, who retired as a Senior Supreme Court judge, and who held the post of vice-chairman of Suhakam. The fourth defendant is Tan Sri Anuar Zainal Abidin – the former Chief Judge of Malaya, and for this exercise he held the position of commissioner of Suhakam. The fifth defendant is Professor Dato’ Hamdan Adnan, a well-known personality, and who held the post of commissioner of Suhakam. Finally, the sixth defendant
- b* is Professor Mehrun Siraj, a lawyer by profession, and holding the post of commissioner of Suhakam. It can certainly be seen that the members of Suhakam comprised of “prominent personalities” of the day as required under s. 5(3) of the Human Rights Commission Of Malaysia Act 1999 (Act 597).
- c* The complaint of the plaintiff was this. That to date Suhakam has not deemed it fit to hold an inquiry into this violent incident notwithstanding that a number of individuals had died and were injured. But it was said that Suhakam had been swift to inquire into other episodes involving breaches of human rights.
- d* So, the plaintiff was prompted to file encl. (1) which was in the nature of an originating summons and he sought for the following prayers:
- e* (1) A declaration that the defendants have breached ss. 4 and 12 of the Human Rights Commission Of Malaysia Act 1999 (Act 597) read together with arts. 5 and 8 of the Federal Constitution by failing to convene, commence and conduct an open inquiry in respect of the Kampung Medan incident.
- (2) An order of court compelling the defendants to comply with ss. 4 and 12 of the Human Rights Commission Of Malaysia Act 1999 (Act 597), in particular Part III thereof.
- f* (3) That the plaintiff be paid damages to the tune of RM50,000,000 (Ringgit Malaysia fifty million).
- (4) That the plaintiff be paid general damages including aggravated and exemplary damages.
- g* (5) Interest payable based on the order of this Honourable Court and at the rate and for the duration of time which this Honourable Court deems fit and proper.
- (6) Costs.
- h* (7) And any other consequential relief which this Honourable Court deems fit and proper.
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Enclosure one (1) was supported by an affidavit of the plaintiff that was affirmed on 17 April 2002 as seen in encl. 2. a

But the defendants did not remain idle. They proceeded to file a summons in chambers in encl. 4 and there they sought for the following prayers:

SUMMONS IN CHAMBERS b

Let all parties concerned attend before the Judge/Deputy Registrar in Chambers on the day of ..., 2002 at ... am/pm on the hearing of an application on the part of the abovenamed Defendants for the following Orders:

1. That the Originating Summons dated the 17th day of April 2002 be struck out against the Defendants pursuant to Order 18 Rule 19(1)(a), (b) and/or (d) of the Rules of the High Court, 1980 and/or the inherent jurisdiction of this Honourable Court. c
2. In the alternative, that the Originating Summons dated the 17th day of April 2002 be struck out against the 2nd and 6th Defendants pursuant to Order 18 Rule 19(1)(a), (b) and/or (d) of the Rules of the High Court, 1980 and/or the inherent jurisdiction of this Honourable Court. d
3. In the further alternative, that prayers 3, 4 and 5 of the Originating Summons dated the 17th day of April 2002 be struck out against the Defendants pursuant to Order 18 Rule 19(1)(a), (b) and/or (d) of the Rules of the High Court, 1980 and/or the inherent jurisdiction of this Honourable Court. e
4. That the costs of this originating summons, including the costs of this application, be paid by the Plaintiff to the Defendants.
5. Such further or other relief as this Honourable Court may deem fit. f

The grounds of this application are set out in detail in the Defendants' Affidavit affirmed by Kamaruddin bin Mohamed Baria on the 29th day of May 2002 and in summary are as follows:

- (1) There is no admissible evidence in support of the Originating Summons. g
- (2) The Plaintiff has no *locus standi* to commence this action and claim the relief sought.
- (3) This Honourable Court should not grant the Plaintiff the relief sought in view of the provisions of the Human Rights Commission of Malaysia Act, 1999 ('the Act'). h

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- a* (4) The Plaintiff has no cause of action, and in any event cannot obtain the relief sought, against the 2nd to 6th Defendants.
- (5) The Plaintiff cannot claim damages from the Defendants.
- (6) This action is premature.
- b* (7) The Defendants have not breached the Act and the Constitution.
- (8) The Plaintiff cannot institute this action in view of Section 18(1) of the Act.
- c* (9) In the circumstances, the Originating Summons discloses no reasonable cause of action, is frivolous or vexatious and/or is otherwise an abuse of the process of this Honourable Court.

Dated the 29th day of May 2002

- d* It must be emphasised that prayers (1), (2) and (4) of encl. 4 were amended before the decision of this court was announced with the concurrence of the learned counsel for the plaintiff. The amendments are as reproduced above. That encl. 4 was supported by an affidavit of the defendants which was affirmed by Kamaruddin bin Mohamed Baria – the secretary of the Human Rights Commission of Malaysia, on 29 May 2002 and that affidavit can be seen in encl. 5.

e There were other affidavits that were filed by the parties thereto and I shall not identify those affidavits in detail. Suffice for me to say that the facts in those other affidavits will be alluded to in this judgment.

f **The Plaintiff's Procedural Objection**

- It was pointed out by the plaintiff that the summons in chambers in encl. 4 was procedurally flawed because “the defendants have cumulatively added limbs (a) and (b) of O. 18 r. 19 (1) of the Rules of the High Court 1980 (“RHC”) whereas limb (b) thereof is said to be disjunctive in each of the prayers.” It was because of this flaw that the plaintiff submitted that the defendants’
- g* summons in chambers in encl. 4 should be struck off with costs.

- In *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775, I was concerned with the pivotal issue of whether in an application for striking out the writ and the statement of claim under O. 18 r. 19 (1)(a) of the RHC,
- h* I should consider the affidavit evidence (see p. 778, third paragraph of the report). In that case too, I was concerned with the preliminary objection of the plaintiff there who was unhappy that the second defendant there sought to strike out the writ and the statement of claim of the plaintiff there using

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cumulatively O. 18 r. 19 (1)(a), (b), (c) and/or (d) of the RHC (see p. 777, first paragraph of the report). And at p. 778 of the report, I had this to say: a

The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v. Associated Portland Cement Manufacturers Ltd.* [1965] 2 QB 582; *R. v. Surrey Quarters Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O. 18 r. 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (d) together and lump them as one as it would run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC. b

In order to appreciate the case of *Sambu (supra)*, it would be ideal to reproduce O. 18 r. 19 of the RHC and I shall do so now: c

19(1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that: d

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or e
- (d) it is otherwise an abuse of the process of the Court.

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- (2) No evidence shall be admissible on an application under para. (1)(a). f
- (3) This rule shall, so far as possible, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

It would appear, at first blush, that on the authority of *Sambu (supra)*, the plaintiff's procedural objection stood on solid ground. But it g

would also appear that the plaintiff had waived his right to raise that procedural objection. There was no promptness on the part of the plaintiff to raise that procedural objection and the conduct of the plaintiff too must be taken into account in order to decide the fate of that procedural objection. The damning conduct of the plaintiff that constitute waiver would be along the following lines: h

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- a* (i) That the plaintiff has filed two affidavits as seen in encls. 13 and 19 by way of a reply to encl. 4. In neither of these affidavits – referring to encls. 13 and 19, has the plaintiff raised the procedural objection or even reserved his right to do so. What is alarming is this. That through these two affidavits – again referring to encls. 13 and 19, the plaintiff has
- b* unreservedly dealt with the merits of encl. 4 and the plaintiff too has responded to the detailed averments in the defendants’ affidavits.
- (ii) Before the introduction of the fast track court in September 2002, I have called up encl. 4 on three occasions, namely, on 4 July 2002, 14 August 2002 and 15 August 2002. In October 2002, I was assigned this case once
- c* again after the introduction of the fast track court and so, on 23 October 2002, I called up encl. 4 once again. Now, it is pertinent to point out that on none of these occasions has the plaintiff’s counsel raised that procedural objection. What transpired was this. That on those occasions,
- d* the plaintiff’s counsel actively participated and sought directions to file written submissions and even sought for an extension of time to file his written submission on behalf of the plaintiff so that the plaintiff could challenge the merits of encl. 4.
- (iii) The defendants too were swayed by the conduct of the plaintiff. In the belief that the plaintiff will be dealing with the merits of encl. 4, the
- e* defendants prepared and filed two further affidavits as seen in encls. 12 and 21. The defendants too proceeded to prepare and file their written submissions.

- I can safely say that the conduct of the plaintiff here leaves much to be desired.
- f* In *Sambu (supra)*, the preliminary objection was raised before the senior assistant registrar and it then came up before me by way of an appeal to the judge in chambers. There was promptitude on the part of the plaintiff in *Sambu (supra)* to raise that preliminary objection. The same cannot be said of the plaintiff here. It is ideal to mention that Abdul Hamid Mohamed J (now JCA)
- g* in *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd dan Lain-lain* [2000] 2 CLJ 601 applied and agreed with the decision in *Sambu (supra)*.

- It can thus be surmised that the plaintiff here had ample opportunity to raise the procedural objection at the earliest opportunity but chose not to do so. On
- h* this point, I need to refer to O. 2 r. 2(1) of the RHC which states as follows:

An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be

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allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. a

In the present case before me, it can rightly be said that the plaintiff did not raise the procedural objection within a reasonable time. The plaintiff simply allowed 4 1/2 months to lapse after encl. 4 came up before me for hearing before he proceeded to raise the procedural objection. The lackadaisical attitude of the plaintiff would certainly attract the provisions of O. 2 r. 2(1) of the RHC. At any rate, it must be emphasised that the plaintiff had taken fresh steps before he raised the procedural objection. For these reasons, the procedural objection should be dismissed forthwith. b

Incidentally, in encl. 4 the defendants also invoked the inherent jurisdiction of this court to strike out the originating summons in encl. (1). And applying *Sambu (supra)*, I was entitled to consider all the facts and the affidavits when adjudicating encl. 4. At p. 778 of the report of the case of *Sambu (supra)*, this was what I said: c

All the facts will be considered and the affidavits as to the facts of the whole case would also be admissible where the application is grounded on the inherent jurisdiction of the Court: *Willis v. Earl Howe* [1893] 2 Ch. pp. 551, 554; *Vinson v. The Prior Fibres Consolidated Ltd.* [1906] WN 209; *Norman v. Matthews* [1916] 85 LJ KB 857 and on appeal it was reported in [1916] WN 133; *Remington v. Scoles* [1897] 2 Ch. 1. d

Be that as it may, in relation to the procedural objection, it was part and parcel of my judgment that the plaintiff had waived his right to raise the procedural objection. I need to refer to some authorities that would support this conclusion. For starters, I would refer to the case of *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394, a decision of Edgar Joseph Jr J (as he then was) and there his Lordship at p. 396 aptly said: e

Moreover, the Respondents in this case had clearly waived their right to take the preliminary objection by filing affidavits in opposition and failing to give to the Applicant prior notice of their intention to raise the preliminary objection. f

I would therefore dismiss the preliminary objection. The hearing of this application must proceed on its merits. g

Before concluding, I have an observation to make, and it is this: Counsel for the Respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, C.J. in *Gurbachan Singh v. Seagrott & Campbell* [1962] MLJ 370 that when points such as this are proposed h

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- a* to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

This would be followed by the case of *Development & Commercial Bank Bhd v. Astrid Jorunn Saniman* [1991] 1 MLJ 435, a decision of Lim Beng Choon J (as he then was). There at p. 437 of the report his Lordship reviewed the evidence and then made the necessary inferences and this was what his Lordship said:

- c* On 19 June 1989 the defendant applied for leave to enter conditional appearance and her application was heard before the senior assistant registrar on 19 June 1989 who granted the defendant leave to enter a conditional appearance. The defendant did not file in her memorandum of conditional appearance until the 23 June 1989. However that may be the defendant applied by way of summons-in-chambers on 19 June 1989 to set aside the issue and/or service of OS 3563 for non-compliance with O. 10 r. 1 read with O. 6
- d* r. 6 and O. 7 r. 5 of the Rules of the High Court 1980. In her affidavit in support of her application affirmed before a Commissioner of Oath at Kuala Lumpur on 19 June 1989 to set aside the issue and/or the service of the said OS she claimed that she had for the last five years or so been residing in Paris and had an address of service which was stated as c/o 94 Rue Chardon Lagarche 75016, Paris, France. She also averred that her solicitors had by
- e* letter dated 21 February 1989 informed the plaintiff that she was in France. In the circumstances therefore it was improper for the plaintiff to proceed by way of substituted service when they would have been unable to do so by way of personal service. It is interesting to note that even before the defendant had entered a conditional appearance she had already filed her application to set aside the issue and service of OS 3563. To my mind the steps taken by
- f* the defendant amounted to a serious irregularity which the court could strike out her application to set aside the issue and service of OS 3563. However as the plaintiff had not raised any objection and had proceeded to take steps to contest the defendant's application it must be deemed that they had waived the irregularity serious though it may be – see *Tozier v. Hawkins* [1885] 15 QBD 650 and *Moore v. Gamgee* [1890] 25 QBD 244.
- g*

Another case in point would be *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 4 CLJ 558, a decision of Mohd Hishamudin JC (now judge), and there his Lordship said at p. 561 of the report:

- h* The other issue was the objection raised by Encik Tan. He objected to plaintiff's encl. 23 on the ground that the service of this affidavit by the plaintiff was also not in compliance with O. 32 r. 13(2)(b). According to him, encl 23, which is a reply to the defendants' encl 19, was served on the

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defendants outside the 14-day period: it was served only on 8 February 1994. Encik Lor, however, replied that when this case first came up for hearing on 26 February 1994, Encik Tan had not objected to the affidavit but instead had asked for a postponement to enable the defendants to file an affidavit-in-reply; and as such, the defendants are now estopped from raising any objection under the rule. As Encik Lor's account of what transpired on 26 February was true, I had, accordingly, overruled the objection on the grounds that Encik Tan, failing to object and by seeking an adjournment with the view of filing an affidavit-in-reply, had, on that day, waived his right to object to the non-compliance with the rule by the plaintiff in respect of encl 23.

Next, it would be the case of *Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237, again a decision of Mohd Hishamudin Yunus JC (now judge). There at p. 240 of the report, his Lordship said:

The issue before me, as I see it, is whether, it is justified for me to reject all these affidavits purely on the grounds of the defects as pointed out in (a) and (b) above by learned Counsel for the defendants? I have given much thought to this matter. Although I view with concern and do not condone any laxity as to compliance with the rules of procedure regarding affidavits and do not wish to be complacent on such matters – and I hope my decision in this case would not be misconstrued as giving a 'licence' to any solicitor to adopt a cavalier attitude in drafting affidavits yet, with respect to learned Counsel, after taking into account the peculiar circumstances of the present case, I do not think that it would be justified for me to reject encls. 7, 14, 15 and 43. I hold that under the circumstances of the case, the defence, by their conduct, had waived their right to object to the defects. First, the defence, in opposing this O. 14 application have filed two affidavits. These affidavits are:

- (1) Encl. 10, the affidavit of Chew Kam Meng, affirmed on 29th June, 1989;
- (2) Encl. 40, the 'supplemental affidavit' of Chew Kam Meng, affirmed on 18 February 1994.

There was, in fact, a third affidavit (encl. 44) – 'affidavit in reply' of Chew Kam Soon affirmed on 8 April 1994 – filed by the defence on 13 April 1994. But this affidavit was objected to by learned Counsel for the plaintiff because of short service, and the objection was upheld. Now, although many objections and points of law were raised in the defendants' affidavits (especially in encl. 40), yet, remarkably, in none of these affidavits (even including encl. 44, which I rejected) were the objections on points (a) and (b) above raised by the defence. The plaintiff has been filing several affidavits ever since 1989 for the purpose of the present application. There is, therefore, nothing new about these omissions in the plaintiff's affidavits. So, why raise the issue about these omissions now?

a This would be followed by the case of *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, a decision of the Court of Appeal with the coram of Shaik Daud, NH Chan and Mahadev Shankar JJCA. There while delivering the judgment of the Court of Appeal, Mahadev Shankar JCA observed at p. 306 of the report:

b It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived. If an objection is taken, the court will have to take the necessary steps under O. 2. This will call for an exercise of discretion which should be appropriately exercised in the circumstances. *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 3 MLJ 715 is an instance where after objection was taken, the court rejected an affidavit in reply which had been filed after a delay of 2 1/2 months.

d Muhamad Kamil Awang J (as he then was) in *Tan Eng Chiang & Anor v. OCBC Bank (Malaysia) Bhd* [1998] MLJU 495 also echoed the same sentiment and at para. 5 thereto his Lordship said:

e 5. It is clear that at the first hearing of the respondent's application, the appellants had not raised an objection but had requested for an adjournment in order to file an affidavit in reply. It seems that after a few adjournments had been granted to enable the appellants to file an affidavit, no affidavit was filed. This was not disputed. By the appellants' conduct, it is deemed that they have waived the right to object.

Again, Muhammad Kamil Awang J said the same thing in *Mohammad Idres s/o Mohd Sulaiman Shah v. Malayan Banking Bhd* [2001] 5 CLJ 308:

f In the instant case, when the appellant filed the summons in chambers there were exchanges of affidavits regarding the subject matter, and by these actions the respondent had clearly indicated that it had waived its right to raise an objection. It was intentional or within its knowledge that he had waived its right. The appellant had believed and acted in the knowledge that the respondent had by its conduct waived its rights. So when the respondent filed his preliminary objection, he was precluded by the doctrine of waiver – as he cannot approbate and reprobate at the same time.

g Now, all these authorities would certainly weigh heavily in favour of the defendants. Coupled with the fact that the defendants also invoked the inherent jurisdiction of this court to strike out the originating summons in encl. (1) as alluded to earlier, the defendants were placed in a stronger position – legally

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speaking, of course. There are passages in the judgment of the then Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 that should be reproduced here. That was a case where the defendants there applied by summons to strike out the plaintiff company's statement of claim. That application of the defendants there succeeded before the senior assistant registrar but it was reversed by the learned judge at the High Court level. The defendants there then appealed to the then Supreme Court and the appeal was allowed. Writing for the then Supreme Court, Peh Swee Chin SCJ aptly said at pp. 611-612 of the report:

In *Tractors* [1975] 2 MLJ 1, the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-toothed comb and decided to agree with the learned judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

In passing, we would like to say that we are not unmindful of the interesting arguments on certain legal points which were however only advanced by learned counsel for the appellants, made necessary no doubt by the then possibility that this court might hold that the letter of 1990 ought to be read as being subject to the letter of 1989. The said legal points were the common law rule in *Pinnel's* case [1602] 5 Co Rep 117a, s 65 of the Contracts Act 1950, etc but they are not necessary for the court in reaching its decision. It would not be appropriate to deal with them here and now and they have to be put away for another day.

In conclusion, with great respect, the learned judge could have avoided the pitfall as described by the Privy Council in *Tractors* [1975] 2 MLJ 1. The lower court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive course albeit such a conclusion was reached on an application filed under O. 18 r. 19.

- a** We must emphasise that for any court to reach such a similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.
- b** We therefore allow the appeal herein by restoring the decision of the learned registrar in question in striking out the amended statement of claim and also dismissing the claims of the plaintiff/company in the civil suit concerned herein. The respondent will have to pay costs here and below.
- c** Appeal allowed.
- Here, encl. 4 was in the nature of a striking out application under O. 18 r. 19 of the RHC. The defendants relied on O. 18 r. 19(1)(a), (b) and/or (d) of the RHC and/or the inherent jurisdiction of this Honourable Court. Whereas in *Sambu (supra)*, the second defendant there by way of encl. 49 sought to strike out the writ and the statement of claim of the plaintiff there by using cumulatively O. 18 r. 19(1)(a), (b), (c) and/or (d) of the RHC. The second defendant in *Sambu (supra)* did not rely on the inherent jurisdiction of the court to strike out the writ and the statement of claim. Here, there was reliance by the defendants on this court's inherent jurisdiction to strike out the plaintiff's
- d** originating summons in encl. (1). That would be the crucial and the marked difference between *Sambu (supra)* and the present case and relying on the speech of Peh Swee Chin SCJ in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd (supra)*, encl. 4 as phrased and framed was good in law.
- e**
- f** Furthermore, as I said earlier, having waived his right to raise the procedural objection the plaintiff had nothing to hold onto. The doctrine of waiver is an interesting branch of the law. It seems that everyone has the right to waive and to agree to waive the advantage of the law that is accorded to him without infringing any public right or public policy (*Great Eastern Ry Co v. Goldsmid* [1884] 9 App Cas 927). The latin maxim for this occasion would be *cuilibet licet renuntiare juri pro se introducto*. So, according to Lord Campbell in *East India Co. v. Paul* [1849] 7 Moo PC 85, an individual may even agree to waive the benefit of the Limitation Act. There are numerous examples of waiver in the law journals. All these examples serve as good guidelines. Thus, the court
- g** in *Markham v. Stanford* [1863] 14 CB (N5) 376 held that the trustees of a turnpike road may, in demising the tolls, waive a statutory requirement that the demise should be signed by the sureties of the lessee. And in the case of *Corporation of Toronto v. Russell* [1908] AC 493, the Judicial Committee held
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that where a notice in writing of the intention to purchase on a compulsory basis was required to be given to the owner of the lands, which provision was entirely for the benefit of that owner, yet the owner might waive it. Yet another example would be the case of *R v. Justices of West Riding of Yorkshire* [1815] 3 M & S 493. That was a case where the statute required the judges to make known to the party of his right of appeal and the steps necessary to carry out this statutory right and the court held that the party might waive this provision when that party declare that he did not intend to appeal. a
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A good waiver is one where the party knows about the relevant facts that led him to exercise the right to waive. According to Eve J, in the case of *Chapman v. Michaelson* [1908] 2 Ch 612, at p. 622, the party must be in a position “to appreciate what his true legal rights were.” Here, undoubtedly the plaintiff also knew “his true legal rights” because he was represented by counsel of his choice right from the very beginning. It would be appropriate to say that the plaintiff’s precarious position in so far as his procedural objection was concerned was further aggravated by the recent amendments to the RHC. The crucial amendments to the RHC would be by way of the introduction of O. 1A which came into force on 17 May 2002 and that O. 1A is worded as follows: c
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ORDER 1A e

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein. f

This would be followed by the new O. 2 r. 3 of the RHC which states as follows:

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. g

The sum total of it all is this. Having regard to the justice of the case, there was no substantial miscarriage of justice occasioned to the plaintiff at all when the defendants relied on encl. 4 to strike out the originating summons in h

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- a* encl. (1). The prayer by the defendants in invoking the inherent jurisdiction of this court in encl. 4 had saved the day for the defendants.

For all these reasons, I must forthwith dismiss the plaintiff's procedural objection with costs. I did just that.

b **To The Heart Of The Matter**

The defendants' arguments were quite simple. It may be summarised as follows:

- (a) that the plaintiff has no cause of action;
- (b) that the defendants have a statutory defence; and
- c* (c) that there was no admissible evidence to support the plaintiff's originating summons in encl. (1).

- d* Before proceeding any further, I must examine the intitlement to the originating summons in encl. (1). That intitlement brings into sharp focus the following legislation:

- (a) Sections 4 and 12 of the Human Rights Commission Of Malaysia Act, 1999 (Act 597) (hereinafter referred to as the "Act");
- (b) Articles 5 and 8 of the Federal Constitution;
- e* (c) Sections 3 and 31 of the Police Act 1967 (Revised 1988) (Act 344);
- (d) Section 20(m) of the Police Act 1967 (Revised 1988) (Act 344) (unfortunately there is no such section in the Police Act 1967 (Revised 1988) (Act 344)); and
- f* (e) Order 7 of the RHC.

- At the outset, I must categorically state that the Police Act 1967 (Revised 1988) (Act 344) is irrelevant for the purpose of adjudicating encl. (1) because the defendants are not members of the "Royal Malaysia Police". Article 5 of the Federal Constitution which governs the liberty of the person is totally irrelevant in the context of adjudicating encl. (1) thereto because the defendants have not deprived the plaintiff "of his life or personal liberty". That would then leave the Act in question and art. 8 of the Federal Constitution for the consideration of this court. It would also leave intact O. 7 of the RHC.

- h* Section 4 of the Act enacts as follows:

Functions and powers of the Commission

- i* 4.(1) In furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be:

- (a) to promote awareness of and provide education in relation to human rights; *a*
- (b) to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken; *b*
- (c) to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and *c*
- (d) to inquire into complaints regarding infringements of human rights referred to in section 12. *d*
- (2) For the purpose of discharging its functions, the Commission may exercise any or all of the following powers:
 - (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research; *e*
 - (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken; *f*
 - (c) to study and verify any infringement of human rights in accordance with the provisions of this Act; *g*
 - (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations; *h*
 - (e) to issue public statements on human rights as and when necessary; and *i*
 - (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities. *j*
- (3) The visit by the Commission to any place of detention under paragraph (2)(d) shall not be refused by the person in charge of such place of detention if the procedures provided in the laws regulating such places of detention are complied with. *k*
- (4) For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution. *l*

a While s. 12 of the Act is worded in this way:

Commission may inquire on own motion or on complaint

b 12.(1) The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons.

(2) The Commission shall not inquire into any complaint relating to any allegation of the infringement of human rights which:

c (a) is the subject matter of any proceedings pending in any court, including any appeals; or

(b) has been finally determined by any court.

d (3) If the Commission inquires into an allegation under subsection 12(1) and during the pendency of such inquiry the allegation becomes the subject matter of any proceedings in any court, the Commission shall immediately cease to do the inquiry.

On the other hand, art. 8 of the Federal Constitution relates to “equality” and it is worded in this fashion:

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8. Equality.

(1) All persons are equal before the law and entitled to the equal protection of the law.

f (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

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(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

h (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit:

(a) any provision regulating personal law;

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- (b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion; *a*
- (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service; *b*
- (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election; *c*
- (e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
- (f) any provision restricting enlistment in the Malay Regiment to Malays. *d*

I do not propose to reproduce in *verbatim* O. 7 of the RHC but suffice for me to say that it relates to and is captioned as “Originating Summonses: General Provisions” and it is certainly relevant to encl. (1). *e*

So much for the legislations and the RHC.

I will now go into specifics. *f*

The Plaintiff’s Cause Of Action

The nub of the plaintiff’s complaint was this. That Suhakam – the first defendant, has failed to exercise its powers under the Act to hold an inquiry into the Kampung Medan incident. Therefore, it would indeed be necessary to analyse the scheme of the Act and the powers conferred by the Act onto Suhakam. *g*

By s. 3(2) of the Act, Suhakam is described as a commission which shall be a body corporate having perpetual succession and a common seal and may sue and be sued in its name. To be precise, s. 3(2) of the Act is worded in this manner: *h*

3.(2) The Commission shall be a body corporate having perpetual succession and a common seal, which may sue and be sued in its name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Commission upon such terms as it deems fit. *i*

- a* So, at all material times, Suhakam is a statutory body performing public functions. While the second defendant to the sixth defendant are members of Suhakam and they together similarly perform public functions.

The preamble to the Act is worded in these salient words:

- b* An Act to provide for the establishment of the Human Rights Commission of Malaysia; to set out the powers and functions of such commission for the protection and promotion of human rights in Malaysia; and to provide for matters connected therewith or incidental thereto.

- c* I have reproduced in *verbatim* s. 4 of the Act, and I will now proceed to highlight the powers of Suhakam:

(i) “to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken” (see s. 4(2)(b) of the Act);

- d* (ii) “to study and verify any infringement of human rights in accordance with the provisions of this Act” (see s. 4(2)(c) of the Act); and

(iii) “to issue public statements on human rights as and when necessary” (see s. 4(2)(e) of the Act).

- e* Section 5(1) of the Act stipulates that Suhakam shall consist of not more than twenty members. While s. 5(2) of the Act enacts that members of Suhakam shall be appointed by the Yang di Pertuan Agong on the recommendation of the Prime Minister. Section 5(3) of the Act states that members of Suhakam shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds. And s. 5(4) of the Act enacts that every member of Suhakam shall hold office for a period of two years and is eligible for reappointment.
- f*

- Section 18 of the Act serves as an umbrella to protect the defendants generally and giving them immunity against, *inter alia*, civil and criminal proceedings in specific instances. It would be ideal to reproduce *verbatim* s. 18 of the Act:
- g*

Protection of members, officers and servants of the Commission

- h* 18. (1) No action, suit, prosecution or proceeding shall be instituted in any court against the Commission or against any member, officer, or servant of the Commission in respect of any act, neglect or default done or committed by him in such capacity provided that he at the time had carried out his functions in good faith.

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- (2) Any member, officer or servant of the Commission shall not be required to produce in any court, any document received by, or to disclose to any court, any matter or thing coming to the notice of, the Commission in the course of any inquiry conducted by the Commission under this Act. **a**
- (3) No action or proceeding, civil or criminal shall be instituted in any court against any member of the Commission in respect of any report made by the Commission under this Act or against any other person in respect of the publication by such person of a substantially true account of such report. **b**
- (4) Chapters IX and X of the Penal Code [Act 574] shall apply to members, officers and servants of the Commission as if references to ‘public servant’ had been replaced with ‘member, officer or servant of the Commission’. **c**

Section 19 of the Act stipulates that Suhakam shall be funded by the Government. Whereas s. 21 of the Act enacts that Suhakam shall submit an annual report of its activities to Parliament and that Suhakam may, when it considers necessary, submit special reports to Parliament. In legal language, s. 21 of the Act is worded in this way: **d**

Annual report **e**

21. (1) The Commission shall not later than the first meeting of Parliament of the following year, submit an annual report to Parliament of all its activities during the year to which the report relates. **e**
- (2) The report shall contain a list of all matters referred to it, and the action taken in respect of them together with the recommendations of the Commission in respect of each matter. **f**
- (3) The Commission may, whenever it considers it necessary to do so, submit special reports to Parliament in respect of any particular matter or matters referred to it, and the action taken in respect thereof. **g**

I cannot help but observe that the matters complained of by the plaintiff are entirely in respect of Suhakam’s exercise of its discretion under the Act.

As reproduced earlier, s. 4(2) of the Act uses the word “may” and it means that Suhakam has the discretion when discharging its functions to exercise any or all of the powers given to it. Thus, Suhakam has the discretion whether: **h**

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- a* (i) “to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken” (see s. 4(2)(b) of the Act).
- (ii) “to study and verify any infringement of human rights in accordance with the provisions of this Act” (see s. 4(2)(c) of the Act).
- b* (iii) “to issue public statements on human rights as and when necessary” (see s. 4(2)(e) of the Act).

c And as reproduced earlier, s. 12(1) of the Act also employs the word “may” and thus it gives Suhakam the discretion to “inquire into an allegation of the infringement of the human rights of such person or group of persons.”

d Now, the word “may” has been described as giving a “discretionary” power as opposed to “directory” or “mandatory” and “compulsory” (*Stylo Shoes v. Prices Tailors* [1960] 2 WLR 8). And, of course, the discretion must be exercised according to common sense and justice and it must be in the nature of a judicial discretion and not based on “the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet” (*Lee v. Bude, etc, Ry* [1871] LR 6 CP 576 at p. 580, per Willes J; *Universal Cargo Carriers v. Citati* [1957] 1 WLR 979; and *Annison v. District Auditor for St. Pancras BC* [1962] 1 QB 489). Devlin LJ in *Berry v. British Transport Commission* [1962] 1 QB 306 at p. 26 aptly said:

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f The court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the construction which it puts upon it – ‘construction’ being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing It is the intent of every statute which confers a discretionary power that the power should be used justly.

g In an old case that goes by the name of *Re Baker* [1890] 44 Ch D 262, Cotton LJ spoke of the quality of the English language when it came to the meaning to be assigned to the word “may”. That was a case where under s. 125(4) of the Bankruptcy Act 1883 a power was given to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy.

h And the question that arose for decision was whether it was a power that must be exercised. At p. 270 to p. 271 of the report, Cotton LJ remarked:

i I think that great misconception is caused by saying that in some cases ‘may’ means ‘must’. It can never mean ‘must’ so long as the English language

retains its meaning, but it gives a power and then it may be a question in what cases, where a judge has a power given to him by the word 'may', it becomes his duty to exercise it In my opinion there is given by the word 'may' a power, to the exercise of which there is a discretion, and there is not here enough to show that it was the duty of the judge to exercise that discretion."

I will now reproduce *verbatim* s. 14 of the Act. It is worded as follows:

Powers relating to inquiries

14.(1) The Commission shall, for the purposes of an inquiry under this Act, have the power:

- (a) to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the Commission thinks necessary or desirable to procure or examine;
- (b) to require that the evidence, whether written or oral, of any witness be given on oath or affirmation, such oath or affirmation being that which could be required of the witness if he were giving evidence in a court of law, and to administer or cause to be administered by an officer authorised in that behalf by the Commission an oath or affirmation to every such witness;
- (c) to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;
- (d) to admit notwithstanding any of the provisions of the Evidence Act 1950 [Act 56], any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings; and
- (e) to admit or exclude the public from such inquiry or any part thereof.

(2) Notwithstanding paragraph (1)(c), where a person summoned is a person under detention under any other written law, such summons shall be issued in accordance with the laws applicable in relation to the place of detention.

It was submitted on behalf of the defendants that s. 14 of the Act, particularly sub-s. (1) thereof uses the words "shall ... have the power", which in essence gave the defendants the discretion to exercise those powers. That was indeed an interesting argument. But it must be recalled that the intitlement to the

- a* originating summons did not specify s. 14 of the Act at all. That was the choice adopted by the plaintiff and he has every right to make that choice. Be that as it may, it is interesting to refer to the case of *R v. Barlow* [1693] Carth 293. That was a case where it was contended that s. 18 of the Poor Relief Act 1662 in enacting that the church wardens and overseers “shall have power and authority” to make a rate to reimburse parish constables on certain expenses left it optional with them to make it or not, the court there held that it was obligatory on them to make it whenever disbursements had been made and had not been paid. Another case of interest to refer to would be that of *R v. Inhabitants of Derby* [1694] Skin 370. Lord Campbell LC in *Liverpool Borough Bank v. Turner* [1860] 2 De GF & J 502 at p. 507 aptly said that:
- b*
- c*

No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

- d*
- In *Howard v. Bodington* [1877] 2 PD 203, at p. 211, Lord Penzance observed:

- e*
- I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

- f*
- In short, it is an exercise in judicial interpretation. Nothing less and nothing more. Thus, in *Re Wolverhampton Borough Councils Aldermanic Election* [1962] 2 QB 460, the court there had to consider the provisions of the Local Government Act 1933, Schedule 3, Part II, para 3(1) which stated that, “At a meeting of the council of a borough the mayor, if present, shall preside”, and the court was called upon to exercise its powers of judicial interpretation. Their Lordships Glyn-Jones J and Thesiger J held that this provision was mandatory in nature and that where, at an aldermanic election, the mayor took part in the proceedings from the floor, and another member of the council took the chair, a casting vote exercised by the latter was said to be void because that council member was given a casting vote only on the assumption that the mayor was not present at the meeting.
- g*

- h*
- Another example of a mandatory provision can be found in the case of *B v. B* [1961] 2 All ER 396. That was a case where Scarman J held that the statutory requirement that a court should consider the arrangements for the case

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and upbringing of the children of a marriage before making a decree of divorce absolute was mandatory and this meant that a decree made without complying with this requirement was said to be a nullity. a

But a provision may be mandatory to one person and permissive to another. A good example would be the case of *Disher v. Disher* [1965] P 31, [1964] 2 WLR 21, [1963] 3 All ER 933. There, a provision in the Magistrates' Courts Rules stated that "at the conclusion of the evidence for the complainant the defendant may address the court" and the court construed that that provision gave the permission to the defendant or his advocate to address the court, but the justices were obliged to hear the defendant or his advocate if the defendant wished to avail himself of this provision. b
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All things said and done, I would, however, construe s. 14 of the Act in this way. That effect must be given to the aim and object of the legislature in enacting s. 14 of the Act. That section gives the requisite mandatory powers of Suhakam for the purposes of an inquiry under the Act which is imperative in nature. But it is entirely up to Suhakam to decide whether it should hold an inquiry and this court cannot interfere with the discretion of Suhakam when it decides not to hold an inquiry. That this is so is clearly seen in s. 12 of the Act. However, once Suhakam decides to hold an inquiry, its mandatory powers under s. 14 of the Act can never be challenged. d
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The Plaintiff's Cause Of Action Lies In Public Law

The learned counsel for all the defendants in the person of Mr Cecil Abraham was very meticulous. He took extra pains in advancing his arguments and all his arguments were crafted in legal niceties that would thrill any judge that hears the case. He was assisted by Mr Dhinesh Bhaskaran, another learned counsel, and together they make perfect music. f

Taking the opposite path would be Mr M Manoharan, the learned counsel for the plaintiff. I must place on record that I am grateful to the learned counsel on both sides for their well fashioned submissions. g

Having said that, I must now go into specifics. It is quite apparent that the plaintiff's cause of action is grounded in public law and not on private law. I say this for the following reasons:

- (a) prayers (1) and (2) of encl. (1) are in the nature of an order for a *mandamus*; and h
- (b) prayers (3) and (4) of encl. (1) are phrased for the sole purpose of seeking for damages and they are certainly in the nature of ancillary prayers.

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a At this juncture, it is opportune to say something about *mandamus*.

The prerogative remedy of *mandamus* is a means of enforcing the performance of public duties by public authorities. It is normally granted on the application of a private litigant. The remedy of *mandamus* can also be utilised by one public authority against another. It is a weapon when held by an ordinary citizen and it is aimed at a public authority who has failed to perform its duty. In essence, *mandamus* is a royal command emanating from the High Court asking a public authority to perform a public duty imposed upon it by law. It is a discretionary remedy and the High Court has the full discretion to withhold it in unsuitable cases (*Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346).

That *mandamus* has the force of law can never be doubted. Any disobedience to a *mandamus* is considered to be a contempt of court and such contempt is punishable by a fine or an imprisonment (*R v. Poplar Borough Council, ex p London County Council (No 2)* [1922] 1 KB 95).

d It must be borne in mind that *mandamus* is a remedy which is only used in public law.

e Under O. 53 of the RHC, the leave of the High Court must be obtained before an applicant files an application for an order of *mandamus*. There is no time limit under O. 53 r. 1A of the RHC to file an application for *mandamus* but the courts are generally reluctant to issue *mandamus* because of laches on the part of the applicant (*Ee Kim Kin v. Collector of Land Revenue* [1967] 2 MLJ 89). The bottom line is this. That *mandamus* is a discretionary remedy (*R v. Churchwardens of All Saints, Wigan* [1876] 1 App Cas 611 at 622). It may be refused when the applicant has been guilty of undue delay (*Broughton v. Commissioner of Stamp Duties* [1899] AC 251, where after a lapse of nine years the applicant claimed for a refund of tax). An extreme case would be that of *R v. Leeds to Liverpool Canal Co* [1840] 11A & E 316, where there was a delay of 65 years and it was said to be fatal. *Mandamus* would also be refused where a public authority has done all that it can reasonably do to fulfil its duty (*R v. Bristol Cpn. Ex p Hendy* [1974] 1 WLR 503). And the court too would withhold the remedy where it would not be in the interest of justice to grant it (*R v. Garland* [1879] LR 5 QB 269).

g *Mandamus* may be issued under s. 44 of the Specific Relief Act 1950; and the procedure is clearly set out in s. 45 of the same Act. But, under s. 44(2) of the Specific Relief Act 1950 a judge of the High Court is not authorised to make an order:

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- (1) that binds the Yang di Pertuan Agong; or *a*
- (2) that binds on any servant of any government in Malaysia where it is merely to enforce the satisfaction of a claim upon that government; or
- (3) that is otherwise excluded by any law for the time being in force. *b*

All these brief insights into the law on *mandamus* would make it apparent that the plaintiff should have pursued his public law remedy through judicial review proceedings under O. 53 of the RHC and not by way of an originating summons by way of encl. (1) where the plaintiff sought for declaratory and injunctive reliefs and damages. *c*

It was rightly submitted on behalf of the defendants that by choosing to file encl. (1), the plaintiff was deliberately attempting to get around the following stringent mandatory requirements and safeguards as enumerated in O. 53 of the RHC:

- (a) the plaintiff would have to apply for leave of the court under O. 53 of the RHC; *d*
- (b) the leave application would have to be filed within 40 days from the date when the grounds of the application first arose; and
- (c) the plaintiff would have to serve his leave application on the Attorney-General's Chambers. *e*

It was vigorously argued that under category (a) the court may have refused to grant the leave and that under category (b), encl. (1) would have been filed well out of time and that the court may have refused to grant the plaintiff an extension of time. Under category (c), it was pointed out that the Attorney-General's Chambers would have had the opportunity of addressing the court and opposing the leave and the substantive applications. For all these reasons, it was rightfully submitted that encl. (1) constituted an abuse of the process of the court and that it ought to be struck out forthwith. I draw solace from the speech of Lord Diplock in the House of Lords in the case of *O'Reilly And Others v. Mackman And Others* [1983] 2 AC 237 where his Lordship said at p. 285 of the report: *f*

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it *g*

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- a* would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
- b* It is interesting to note that the Court of Appeal speaking through Mahadev Shankar JCA had applied the case of *O'Reilly And Others v. Mackman And Others (supra)* in the case of *Yahya bin Kassim v. Government of Malaysia & Anor* [1998] 1 CLJ 43 and there, at p. 48 of the report, his Lordship had this to say:
- c* Quite apart from the fact that the appeal was devoid of merit, we are astonished that the appellant was persuaded to bring it, because it is an abuse of process to resort to an action for declaration and thereby evade the clear requirements of O. 53 r. 1A of the RHC. Our rules on this subject are almost
- d* *in pari materia* with the English rules. The subject has been decided in *O'Reilly & Ors v. Mackman & Ors* [1983] 2 AC 237. It should suffice to set out the relevant part of the headnote. It reads (at p. 238):
- e* Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it
- f* would be an abuse of the process of the court to show the actions to proceed and thereby avoid the protection afforded to statutory tribunals (post, pp 274H-275A, 285D-E, G-H and 286A-C).
- It is a pity this action was ever allowed to get off the ground because it was such an obvious non-starter.
- g* In the same vein, I had this to say in the case of *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339:
- h* The defendant argued through his counsel that there was no material to show that the A-G, as the guardian and protector of public interest, has given his consent to support the plaintiff's originating summons in encl. 4. In short, the defendant submitted that since this was not a relator action, the plaintiff must show his standing to commence encl 4. I agree and I must add that
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the plaintiff was trying to circumvent O. 53 of the RHC when he sought for prayer 3 because that prayer was more in the nature of mandamus. The plaintiff must have thought that by seeking a declaration for prayer 3, he need not obtain the necessary leave as spelt out in O. 53 of the RHC. It is apparent that it was an abuse of the process of the court for the plaintiff to proceed by way of an originating summons in encl 4 when he knew fully well that by so doing he would be bypassing the leave requirement as stipulated in O. 53 of the RHC.

Along the same lines, there are passages appearing in *Clerk & Lindsell On Torts*, 17th edn, at p. 569 to p. 570 that merit reproduction and they are as follows:

Public/private law remedies? Even in those instances where a statutory duty is found to be owed by a public authority to an individual, difficulty in enforcing that duty may arise. When the duty imposed on the authority necessarily requires the exercise of the authority's discretion, as in determining whether or not a person is intentionally homeless, any action for breach of that statutory duty may have to proceed by way of an application for judicial review, rather than an action in tort commenced by writ. The House of Lords held in *O'Reilly v. Mackman* [1983] 2 AC 237, H.L., that as a general principle any challenge to a decision of a public authority on the grounds that the authority contravened public law principles, for example, acted *ultra vires*, must proceed by way of R.S.C., Ord. 53. In *Cocks v. Thames District Council* [1983] 2 A.C. 286, H.L., the plaintiff started an action for breach of the statutory duty imposed by the Housing (Homeless Persons) Act 1977. The defendants had refused to house him permanently on the grounds that they considered him to be intentionally homeless. His action in tort was struck out as an abuse of the process of the court. Their Lordships held that to establish breach of statutory duty the plaintiff must first establish that the decision holding him to be intentionally homeless was *ultra vires*. He must thus proceed by way of an application for judicial review and his claim for damages, if the court found in his favour, could be annexed to that application. The requirement for leave to apply for judicial review and the short time limit for such applications place persons seeking compensation for breach of statutory duties incorporating a discretionary element at a substantial procedural disadvantage (See *Street on Torts* (9th ed., 1993), pp. 184-186). In *Jones v. Department of Employment* [1988] 2 W.L.R. 493, the Court of Appeal struck out a claim for negligence in which the plaintiff alleged that he had been denied unemployment benefit because of an adjudication officer's negligence. Glidewell L.J. expressed the view that:

... it is a general principle that, if a government department or officer, charged with the making of decisions whether certain payments should be made is subject to a statutory right of appeal against his decisions,

a he owes no duty of care in private law. Misfeasance apart (See *Bourgoin v. Minister of Agriculture, Food and Fisheries* [1986] Q.B. 716, C.A., see Street *op. cit.* pp. 481-482), he is only susceptible in public law to judicial review or to the right of appeal provided by the statute under which he makes his decision [1988] 2 W.L.R. 493 at 507; and see, per Slade L.J. at 510.

b Neither Glidewell L.J. or Slade L.J. refer directly to the question of whether a decision having been quashed by way of judicial review the public authority or officer might be liable in damages for breach of statutory duty. But the tenor of that judgment must make such an outcome unlikely. Similarly in *Calveley v. Chief Constable of Merseyside* [1989] 2 W.L.R. 624, H.L., the

c House of Lords held that the obligation imposed by the 1985 Police (Discipline) Regulations to give notice to a police officer under investigation as soon as is practicable of the matters alleged against him did not give rise to an action for damages for breach of statutory duty if not performed. The remedy available to the officer if he were prejudiced by such a failure to give

d notice, or delay in so doing, was by way of judicial review. Lord Bridge declared:

The proposition that the legislature should have intended to give a cause of action in contemplation of the remote economic consequences of any delay in giving notice ... is really too fanciful to call for serious consideration *ibid* at 630.

e All these authorities would greatly whittle away the sting of enclosure one (1). In its present form, encl. (1) must collapse. The plaintiff should have proceeded by way of a judicial review as envisaged under O. 53 of the RHC.

f ***Locus standi***

By far this is the most interesting issue. A submission was made by the learned counsel for the defendants that even if the plaintiff is said to be entitled to pursue his public law remedy by way of encl. (1), yet the plaintiff is said not to have the requisite *locus standi* to pursue the matter. Order 53 of the RHC does not define *locus standi* of an applicant who applies for *mandamus*. It is

g the courts, over the years, that give and evolve the meaning to the phrase *locus standi*. The law may be stated as follows. Remedies must correlate with rights. So, only those whose own rights that are at stake are qualified and eligible to be awarded remedies. Only parties whose personal rights are in issue can have standing. The courts are always fearful that they may “open the floodgates”

h and be swarmed with litigation.

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In public law litigation, a private citizen will not be able to commence such litigation unless he has standing or *locus standi*. If that private citizen has obtained the consent of the Attorney General, the suit is then labelled as a relator action where the Attorney General becomes the plaintiff and the private citizen becomes his relator.

To prove standing, the private citizen must pass the stringent test as laid down by Tun Abdul Hamid Omar CJ (Malaya) in the landmark decision of *Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12, 31:

But in Malaysia, there is no provision in our Rules of the High Court equivalent to Order 53 rule 3 (7) of the English Rules of the Supreme Court. This, in my view, there shall be a stringent requirement that the applicant, to acquire locus standi, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v. Union of Post Office Workers and Others* [1977] 3 All E.R. 70; [1978] A.C. 435, and also *Boyce's case (Boyce v. Paddington Borough Council* [1903] 1 Ch. 109 and this I consider to be the relevant test to apply when determining the question of standing.

And, I had generously applied the test propounded in *Lim Kit Siang* in the case of *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru (supra)*, particularly at pp. 346-347 of the report:

As a ratepayer and a road-user the plaintiff must show that his private rights have been infringed or if no private right has been infringed, he has suffered a special damage peculiar to himself over and above any infringement of his public rights before he can be vested with *locus standi*. Put in another way, the right to appear in court is given to the plaintiff if he is suing to enforce some private right or even some public right provided the interference with that public right causes direct damage to him. As a ratepayer, the plaintiff's house is not located near the floating city. In fact, it is located some miles away from it just like other ratepayers and in this regard the plaintiff has failed to show by evidence that he has suffered any special damage arising out of the alleged purported breach of the relevant law by the defendant. To give *locus standi* to a ratepayer like the plaintiff would open the floodgates and this would in turn stifle development in the country. There was no genuine private interest for the plaintiff to protect. He was more concerned about the publicity that went along with this case. As a lawyer, that kind of publicity must have been good to him. The Dato' Bandar aptly described him as a busybody. I venture to describe him as trouble shooter, a maverick of a sort out to stir trouble.

As a road-user, the plaintiff argued that he was affected by the development of the floating city since he traveled along the beach front to proceed to his office.

- a* He forgot that other road-users also ply along that stretch of the road and, applying the *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, he cannot be said to be prevented from using other available internal roads to proceed to his office. There was and is always an option for him to select – the beach road or the internal road.
- b* And at p. 347 of the report, I continued to say:
- Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156, *Abdul Razak Ahmad v. Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297, *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*, *Tan Sri Haji Othman Saat v Mohamed bin Ismail and Government of Malaysia v. Lim Kit Siang* all show a singular trend and that trend is this: For a plaintiff to found an action against the defendant who is a public body, he must show that he has suffered a peculiar damage by the alleged public wrong and that he has a genuine private interest to protect. Unfortunately, the plaintiff here failed to show by evidence that he has suffered any damage as a result of the construction of the floating city by JCD by way of nuisance or trespass except to say that he was aggrieved as a taxpayer and a road-user.
- d*

To round up it up, this was what I said at p. 349 of that case:

- e* The stringent requirement as propounded by Abdul Hamid CJ (as he then was) in *Government of Malaysia v. Lim Kit Siang* where his Lordship said: ‘Thus, in my view, there shall be a stringent requirement that the applicant ... to acquire *locus standi* has to establish infringement of a private right or the suffering of special damage’ should be vigorously applied to the plaintiff in this case.
- f* To ascertain the plaintiff’s standing when he files encl. (1), I must look at the plaintiff’s affidavit in encl. 2. There, the plaintiff claims that he is a “victim” of the Kampung Medan incident but yet he has not averred that he has suffered any injury or that he has suffered any financial loss arising from that incident. The truth of the matter is this. That the plaintiff is not even one of the ten individuals who lodged the police reports in regard to the incident. By way of para. 12 of encl. 2, the plaintiff admits that he has filed encl. (1) in the “public interest” and on behalf of others who are unidentified. This shows that the plaintiff has not suffered any injury peculiar to himself.
- g*
- h* In my judgment, the private right of the plaintiff has not been infringed and he too has not suffered any special damage. Consequently, it was also part and parcel of my judgment that the plaintiff has no *locus standi* and his originating summons in encl. (1) must fail.
- i*

The Plaintiff's Cause Of Action Lies In Private Law

Even assuming that the plaintiff's cause of action lies in private law, the plaintiff must show that Parliament intended that what Suhakam did is actionable by way of a civil remedy. It must be recalled that the nub of the plaintiff's complaint is that his human rights have been infringed as a result of the violence that broke out in Kampung Medan and that Suhakam – the first defendant, had a statutory duty to inquire into that incident but, somehow, failed to do so. In short, the plaintiff must show that Parliament intended that this breach of statutory duty on the part of Suhakam is actionable and that the plaintiff being aggrieved can proceed by way of a civil remedy. That this is the position of the law is readily amplified by the decision of the House of Lords in the case of *Haque v. Deputy Governor of Parkhurst Prison and others*, *Weldon v. Home Office* [1991] 3 All ER 733 with a coram of Lord Bridge of Harwich, Lord Ackner, Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Lowry. I need to refer to the judgment of Lord Jauncey of Tullichettle and there his Lordship said at p. 748 to p. 750 of the report:

Breach of statutory duty

Mr Sedley QC for Hague submitted that there had been a breach of the Prison Rules which sounded in damages. In a carefully reasoned argument to which I hope that I do justice in paraphrasing he argued that a breach of statutory duty unaccompanied by a statutory remedy or penalty affords a right of action to a person injured thereby where the plaintiff belongs to a class which the statutory provision was intended to protect, and the breach has caused the plaintiff damage of a kind against which the provision was intended to protect him. In support of this proposition he relied on *Groves v. Lord Wimborne* [1898] 2 QB 402 and *Cutler v. Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544, [1949] AC 398. Where such a situation existed, as it did in the present case, no question of legislative intent arose. Mr Sedley invited your Lordships to overrule *Arbon v. Anderson* [1943] 1 All ER 154, [1943] KB 252 and *Becker v. Home Office* [1972] 2 All ER 676, [1972] 2 QB 407, in both of which cases it had been held that a breach of the Prison Rules did not give rise to an action of damages.

Mr Laws on the other hand maintained that the first question to be considered was what rights, if any, Parliament intended to confer in passing the statute and that matters such as availability of other remedies merely assisted the resolution of that question and were not in themselves decisive. He also relied on *Groves v Lord Wimborne and Cutler v. Wandsworth Stadium Ltd (in liq)*. Mr Laws argued that the Secretary of State had no power under s. 47 of the Prison Act 1952 to make rules which conferred private rights on individuals.

- a** In order to consider these arguments it is necessary to examine the relevant authorities. *Groves v. Lord Wimborne* arose out of a breach of a duty imposed by the Factory and Workshop Act 1878 to fence dangerous machinery. At the beginning of his judgment A L Smith LJ referred to the 1878 Act as 'a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit' (see **b** [1898] 2 QB 402 at 406). In dealing with the question whether the cause of action which was *prima facie* given by the relevant section had been taken away by certain provisions as to payment of fines, he said (at 407-408):

- c** In dealing with the question whether this was the intention of the Legislature it is *materia l...* to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons. The Act now in question, as I have said, was clearly passed in favour of workers employed in factories and workshops, and to compel their employers to perform certain statutory duties for their protection and benefit.

- d** Later (at 408), after consideration of further matters, he said that he had been led to the conclusion:

- e** that it cannot have been the intention of the Legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the *prima facie* right of the workman to be fully compensated for injury occasioned to him by that neglect.

Rigby LJ said (at 414):

- f** The plaintiff is one of those persons, the possibility of injury to whom through neglect to fence machinery the section contemplates. That being so, the only question seems to be whether the provisions of the Act with regard to the imposition of fines for neglect of the duty created by the section reasonably lead to the conclusion that the Legislature intended that such fines should be the only remedy for breach of that duty. I think that, when those provisions are examined, it is impossible **g** to arrive at that conclusion.

Vaughan Williams LJ said (at 416):

- h** In such a case as this one must, as Lord Cairns said in *Atkinson v. Newcastle Waterworks Co.* ([1877] 2 Ex D 441, [1874-80] All ER Rep 757), look at the general scope of the Act and the nature of the statutory duty; and in addition one must look at the nature of the injuries likely to arise from a breach of that duty, the amount of the

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penalty imposed for a breach of it, and the kind of person upon whom it is imposed, before one can come to a proper conclusion as to whether the Legislature intended the statutory remedy to be the only remedy for breach of the statutory duty.

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All the members of the Court of Appeal were clearly of the view that the intention of the legislature had to be looked at in determining whether breach of a statutory duty gave rise to an action in tort.

b

In *Cutler v. Wandsworth Stadium Ltd* [1949] 1 All ER 544 at 548, [1949] AC 398 at 407 Lord Simonds, after referring to the question whether where a statutory obligation is placed on A, B who conceives himself to be damnified by A's breach of it has a right of action against him, stated:

c

I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.

d

e

Lord Simonds later referred with approval to a passage from the speech of Lord Kinneir in *Black v. Fife Coal Co Ltd* [1912] AC 149 at 165, which included the following sentences:

f

We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to the danger.

g

Once again the intention of the legislature is treated as a matter of importance.

In *Lonrho Ltd v. Shell Petroleum Co Ltd* [1981] 2 All ER 456 at 461, [1982] AC 173 at 185 Lord Diplock referred to the general rule that where an Act creates an obligation, and enforces the performance in a specified manner the performance cannot be enforced in any other manner, and then set out one or two exceptions to the rule:

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- a** The first is where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation.
- b** This exception was referred to by Lord Bridge of Harwich in *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622 at 632, [1991] 2 WLR 513 at 523 in the following terms:
- But in order to fall within the principle which Lord Diplock had in contemplation it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach.
- c**
- Finally, in *Calveley v. Chief Constable of the Merseyside Police* [1989] 1 All ER 1025 at 1029, [1989] AC 1228 at 1237 Lord Bridge of Harwich, in the context of a submission that breach of one of the Police (Discipline) Regulations 1977, SI 1977/580, gave a right to damages, said:
- d**
- That the duty is imposed for the benefit of the police officer subject to investigation is plain. But it seems to me equally plain that the legislature cannot have contemplated that the object of the duty was to protect the officer from any injury of a kind attracting compensation and cannot, therefore have been intended to give him a right to damages for breach of the duty.
- e**
- My Lords, I take from these authorities that it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.
- f**
- Proceeding further, reference to *Clerk & Lindsell On Torts*, 17th edn at p. 562 should also be made. There the learned authors nicely summarised the essential elements of the plaintiff's cause of action in private law in these words:
- g**
- Essentials of the action. Liability for breach of statutory duty (*Bourgoin v. Minister of Agriculture, Fisheries and Food* [1986] Q.B. 716, C.A. and see 11-17), though it is sometimes termed 'statutory negligence', is in reality sui generis and independent of any other form of tortious liability (See 1-97 and 11-25. On the relationship between statutory duties and the duty of care at common law, see *Bux v. Slough Metals Ltd* [1974] All E.R. 262. C.A.; *Barrett* [1974] 37 M.L.R. 577. The Supreme Court in Canada in *R. v. Saskatchewan*
- h**
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Wheat Pool [1983] 43 D.L.R. (3d) 392 rejected the notion of an independent tort of breach of statutory duty: see *Horton Rodgers* [1984] C.L.J. 23). As the construction of each statute turns ultimately on its particular wording it is difficult to formulate principles of general application; but it is clear that to establish civil liability for a breach of a statutory duty a plaintiff must show that (a) the injury he has suffered is within the ambit of the statute; (b) the statutory duty imposes a liability to civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused his injury.

And it is of interest to note, that the aforesaid exposition of the law was vigorously applied by Lim Beng Choon J in *Hu Sepang v. Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739. To do justice to the plaintiff, I will now examine each of these essential elements as set out by the learned authors of *Clerk & Lindsell On Torts*, 17th edition in quick succession, in the context of the said Act.

Is The Plaintiff's Injury Within The Ambit Of The Act?

I have earlier mentioned that the plaintiff has suffered no injury and so the plaintiff cannot satisfy this requirement at all.

Does The Statutory Duty Under The Act Impose A Liability To Civil Action?

I hold the view that the intention of the Act is to confer an absolute discretion on Suhakam as to whether to hold an inquiry and as to how that inquiry, if held, is to be conducted. I too hold the view that any judicial intervention as to Suhakam's discretion will result in a usurpation of Suhakam's functions by the court. So, I say, with a certain measure of certainty, that the legislature did not intend to confer a cause of action onto the plaintiff in a situation of this nature. In short, the plaintiff cannot by way of prayers (1) and (2) of encl. (1), order the defendants to do his bidding by holding an inquiry nor could the plaintiff dictate the precise mode of the inquiry by holding an open inquiry. It is my judgment, that Suhakam and its members must be able to conduct their affairs independently and be free to inquire into human rights violations without being shackled by third parties intervention. So the intervention by the plaintiff here is certainly uncalled for.

Support for my views can be found in the passages of *Clerk & Lindsell On Torts*, 17th edition where the learned authors said at p. 559 to p. 560:

It would not be appropriate here to provide a catalogue of the vast and increasing number of statutory duties, and it is proposed instead to consider the principles which apply to their interpretation (For detailed consideration

- a** of breach of statutory duty in the context of industrial safety legislation, readers are referred to Munkman, *Employer's Liability at Common Law* (11th edn., 1990): for a statutory duty may be held to give rise to a liability to a civil action. It is now beyond doubt that such liability will arise only when the plaintiff can establish that Parliament intended breach of the relevant statutory duty to be actionable by an individual harmed by that breach. Lord Denning attempted in *Ex p. Island Records* [1978] Ch. 122 at 139 to revive an earlier and much broader principle (See e.g. *Couch v. Steel* [1854] 3 E. & B. 402) that whenever violation of a statute caused harm to 'private rights' an action lay at the instance of the injured individual. That attempt was firmly quashed by the House of Lords in *Lonrho Ltd v. Shell Petroleum Co. Ltd (No. 2)* [1982] A.C. 173. Lonrho sought compensation from the defendants, their competitors in the oil trade. They alleged that they (Lonrho) had suffered heavy losses because they complied with Orders in Council prohibiting trade with the illegal regime in Southern Rhodesia while the defendants flagrantly flouted those sanctions orders. Lord Diplock, with whom the rest of the House concurred, expressly rejected the 'broad' principle of liability expounded by Lord Denning in *Ex p. Island Records*. He reasserted the 'general rule' (*Doe & Bishop of Rochester v. Bridges* [1824-34] All ER Rep. 167 at 170) for liability for violation of a statute that:
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- ... where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner ... Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory prohibition for which the Act provides, there are two classes of exception to this general rule ([1982] A.C. 173 at 185).
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- f** The first exception is 'where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation (*ibid*). And the second arises 'where the statute creates a public right' (that is, a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in *Benjamin v. Storr* ([1874] L.R. 9 C.P. 400 at 407 described as 'particular direct and substantial' damage 'other and different from that which was common to all the rest of the public' [1982] A.C. 173 at 186. As to the applicability of Lord Diplock's second exception see *Stanton, Breach of Statutory Duty* [1986], pp. 49-51 and *Street on Torts* (9th ed.), pp. 364, 399, 406-407). The Orders in Council prohibiting trade with Rhodesia were designed to bring down the illegal regime, and not to benefit or protect traders such as Lonrho. Lonrho could bring themselves into neither exception
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so as to escape the general rule that violation of a statute per se is not actionable at the suit of an individual. a

Continuing further, the learned authors of the same textbook said at p. 567 to p. 569:

Where no sanction is prescribed. It has been suggested that when a statute creates a duty, but imposes no penalty, civil or criminal, for its breach, a presumption arises that a person injured thereby will be able to sue in tort for breach of statutory duty ('For otherwise the statute would be but a pious aspiration', see *Cutler v. Wandsworth Stadium Ltd* [1949] A.C. 398 at 407, per Lord Simonds). If such a presumption exists it is of little effect. The House of Lords made it clear in *R. v. Deputy Governor of Parkhurst Prison, ex p. Hague* [1992] 1 A.C. 58 that it does not follow that simply because no sanction is prescribed for breach of a statutory provision designed to protect particular individuals, a private right of action is automatically conferred. Counsel for the appellant had argued that in the absence of any remedy prescribed in the Prison Rules relating to discipline and segregation of prisoners, a right of action for breach of those Rules must arise. Their Lordships vehemently disagreed. In every instance, whether or not any alternative remedy is provided in the statute, evidence must be advanced that Parliament intended that aggrieved individuals should be able to sue for damages. The objects of the relevant provision must be scrutinised. b

The Prison Act 1952 is designed to deal with the administration of prisons and the management and control of prisoners. It covers such wide-ranging matters as central administration, prison officers, confinement and treatment of prisoners, release of prisoners on licence [...]. Its subjects are far removed from those of legislation such as the Factories and Coal Mines Acts whose prime concern is to protect the health and safety of persons who work therein (*ibid.* at 171). c

Once there is sufficient evidence that Parliament intended the relevant duty to be enforceable by private action, it is suggested that it does not matter whether the class of persons protected by the statute embraces the public at large (*Monk v. Warbey* [1935] 1 K.B. 75. C.A.; *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832 at 841, per Atkin L.T.), or a smaller designated category of individuals (But see to the contrary effect: *Clegg, Parkinson & Co. v. Earby Gas Co.* [1896] 1 Q.B. 592 at 595; *St Ives R.D.C.* [1990] 1 Q.B. 312 at 324). d

To give just some examples of successful actions, an education authority was liable to a child injured through breach of their statutory duty to maintain the school premises (*Ching v. Surrey C.C.* [1910] 1 K.B. 736. An action will lie for breach of s. 10 of the Education Act 1944; *Reffell v. Surrey C.C.* e

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- a* [1964] 1 W.L.R. 358); lock owners were liable to a person suffering loss through their failure to repair the lock as required by statute (*Blundy Clark v. L.N.E. Ry* [1931] 2 K.B. 334; see also *Guilfoyle v. Port of London Authority* [1932] 1 K.B. 336 (swing bridge)); a farmer whose land was flooded was able to recover damages from the local authority who were responsible by statute for maintaining the drains ((*Att-Gen. v. St Ives R.D.C.* above); a person recovered damages who lost the benefit of a local land charge through the registrar's breach of his duties under the Land Charges Act 1925 (*Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223), and a homeless person was entitled to damages against a local authority for breach of its obligations under the Housing (Homeless Persons) Act 1977 (*Thornton v. Kirklees M.B.C.* [1979] Q.B. 626).

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- Actions against public authorities.** There would appear to be today a significant trend against finding that a remedy in breach of statutory duty lies against public authorities charged with the protection of the public welfare (See *R. v. Inner London Education Authority ex p. Ali*, *The Times*, February 21, 1994, DC; *M. v. Newham LBC* [1994] 2 WLR 554, at 579, per Staughton LJ). In *M. v. Newham London Borough Council* [1994] 2 WLR 554, the Court of Appeal held no right of action lay on the part of children alleging that they continued to suffer from abuse due to the failure of the defendant local authority to enforce child protection legislation. In *E. v. Dorset County Council* [1994] 3 W.L.R. 853, C.A. breach of provisions of the Education Acts in relation to children with special needs was found not to give rise to an action for breach of statutory duty. The reasons for the courts' disinclination to infer a private right of action against public authorities are perhaps twofold. Enforcement by the civil law is seen as unlikely to be Parliament's choice of an effective means of enforcing public protection measures (*M v. Newham L.B.C.* at 579). And the judges are well aware of the economic consequences of too ready availability of civil suits against public authorities. As Lord Bridge put it in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398 at 482, H.L.:

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- g* ... the shoulders of a local authority are only broad enough to bear the loss because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses. If they do so decide, it is not difficult for them to say so (For analysis of the negligence liability of public authorities, see 7-96 *et seq*).

- h* The more general the duty cast of a public authority, the less likely it is that a private right of action will be found to lie. Hence it has been held that no action lies against the Minister of Education for breach of his duty 'to promote the education of the people of England and Wales' (*Watt v. Kesteven C.C.*

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[1955] 1 Q.B. 408; *Stanton, Breach of Statutory Duty*, pp. 81-93) and an action against the Minister of Health for failing to provide an efficient and comprehensive health service failed (*R v. Secretary of State for Social Services, ex p. Hincks* [1979] 123 S.J. 436. The plaintiff must generally establish a defined and specific duty owed to him personally, rather than a 'political' duty owed to society at large. Thus in *Thornton v. Kirklees Metropolitan Borough Council* [1979] Q.B. 626, C.A., the plaintiff succeeded in an action against the local authority who had failed to house him as required by the Housing (Homeless Persons) Act 1977. The duty imposed on the authority was intended to benefit individuals who found themselves homeless. It was more than a general statement of the 'political' duties of the local authority.

I will now refer to the case of *Tan Chye Choo & Ors v. Chong Kew Moi* [1970] 1 MLJ 1 which also supports my view. There Lord Morris of Borth-y-Gest delivering the judgment of the Privy Council was of the view that the breach of the Motor Vehicles (Construction and Use) Rules, 1959 did not give the appellants a cause of action against the respondent. At p. 4 of the report, his Lordship had this to say:

Guidance as to the principles to be applied in considering whether there is a right of action in a person who claims that he has been injured by reason of a breach of statutory duty is to be found in the speeches in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398. Lord Simonds in his speech at p. 407 said:

The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But 'where an Act' (I cite now from the judgment of Lord Tenterden C.J. in *Doe v. Bridges*) 'creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore v. Oswaldtwistle Urban District Council*. But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the

- a** appellant, than in the words of Lord Kinnear in *Black v. Fife Coal Co. Ltd.*: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* and by Lord Herschell in *Cowley v. Newmarket Local Board* solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger.
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- c** But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention.' An earlier and a later example of the application of this principle will be found in *Groves v. Wimborne (Lord)* and *Monk v. Warbey*, in the former of which cases the Act in question was described by A.L. Smith L.J. as 'a public Act passed in favour of the worker in factories and workshops to compel their employers to do certain things for their protection and benefit'.
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- Lord du Parc in his speech pointed out that in the preceding quarter of a century in cases where it was being considered whether there was a right of action resulting from a breach of statutory duty 'the debate has normally turned on the question whether the case before the court falls within the decision in *Groves v. Wimborne (Lord)* [1898] 2 Q.B. 402 or that in *Phillips v. Britannia Hygienic Co. Ltd.* [1923] 2 K.B. 832. Lord Normand in his speech (see p. 413) also stated the general principle with great clarity. To the same effect had been the approach of Greer L.J. and of Maugham L.J. in their judgments in *Monk v. Warbey* [1935] 1 K.B. 75. In those judgments approval was given of the principle stated by Atkin L.J. in *Phillips* case.
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- In the *Phillips* case a regulation contained in the Motor Cars (use and Construction) Order 1904 made under powers given by the Locomotives on Highways Act 1896 provided that 'The motor car and all the fittings thereof shall be in such a condition as not to cause or to be likely to cause, danger to any person on the motor car or on any highway.' Through no fault of its owners a vehicle was in such a condition as to cause danger to persons on it or on the highway. Though it had some seven weeks earlier been sent for overhaul and repair one of its axles was in fact defective. The axle broke and a wheel came off and damaged another vehicle. A claim by the owner of the damaged vehicle having succeeded in the County Court, the basis of the decision being a breach of statutory duty, it was held in the Divisional Court and in the Court of Appeal that no right of action lay. In his judgment Atkin L.J. expressed the conclusion that the duty which the various regulations
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imposed was not a duty enforceable by individuals injured but a public duty only. He added:

It is not likely that the Legislature in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence.

In their Lordships' view it is not possible to differentiate the contention raised in the present case from that which was rejected in *Phillips'* case. Nor has a consideration of the decisions in pedestrian crossing cases including that in *London Passenger Transport Board v. Upson* [1949] A.C. 155 led their Lordships to any different conclusion.

This would be followed by the case of *X and others (minors) v. Bedfordshire County Council, M (a minor) and another v. Newham London Borough Council and others, E (a minor) v. Dorset County Council and other appeals* [1995] 3 All ER 353, a decision of the House of Lords. It would be sufficient for this exercise to refer to the headnote at p. 355 to p. 358 where the House of Lords held:

(1) Private law claims against public authorities for damages could be classified into four different categories: (i) actions for breach or statutory duty simpliciter (ie, irrespective of carelessness); (ii) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (iii) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; (iv) misfeasance in public office, ie, the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct was unlawful (see p. 361 j, p. 363 a b j to p. 364 b and p. 400 h, post).

(2) In actions for breach of statutory duty simpliciter a breach of statutory duty was not by itself sufficient to give rise to any private law cause of action. A private law cause of action only arose if it could be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. Whether the statute provided other

- a** remedies for its breach and whether on the true construction of the statute it was shown that the protected class was intended by Parliament to have a private remedy were indicia of whether a private law cause of action lay for breach of a statutory duty (see p. 361 j, p. 363 a b, p. 364 d to g and p 400 h, post); *Cutler v. Wandsworth Stadium Ltd* [1949] 1 All ER 544 and *Lonrho Ltd v. Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456 applied.
- b**
- c** (3) The mere assertion of the careless exercise of a statutory power or duty was not sufficient in itself to give rise to a private law cause of action. The plaintiff also had to show that the circumstances were such as to raise a duty of care at common law. In determining whether such a duty of care was owed by a public authority, the manner in which a statutory discretion was or was not exercised (ie, the decision whether or not to exercise the discretion) had to be distinguished from the manner in which the statutory duty was implemented in practice. Since it was for the authority, not for the courts, to exercise a statutory discretion conferred on it by Parliament, nothing the authority did within the ambit of the discretion could be actionable at common law, but if the decision was so unreasonable that it fell outside the ambit of the discretion conferred on the authority that could give rise to common law liability. Furthermore, there was no common law duty of care in relation to the taking of decisions involving policy matters, since the courts could not adjudicate on such policy matters and therefore could not reach the conclusion that the decision was outside the ambit of the statutory discretion. Accordingly, a claim alleging negligence in the exercise of a statutory discretion involving policy considerations would pro tanto fail as being non-justiciable. If, however, the claim was justiciable then the ordinary principles of negligence, ie whether the damage was reasonably foreseeable, whether there was proximity of relationship between the parties and whether it was fair, just and reasonable to impose a duty of care, applied. In particular, the requirement that it had to be just and reasonable to impose a common law duty of care in all the circumstances before liability in negligence would be imposed applied not only where the plaintiff's claim was for pure economic loss but also where the claim was for physical damage (see p 361 j, p 363 a b, p 365 e, p 367 h, p 368 c d f to h, p 371 b to e, p 380 g and p 400 h, post); *Geddis v. Proprietors of Bann Reservoir* [1878] 3 App Cas 430, *Anns v. Merton London Borough* [1977] 2 All ER 492 and *Home Office v. Dorset Yacht Co Ltd* [1970] 2 All ER 294 considered.
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- h** (4) In the abuse cases, the claims based on breach of statutory duty had been rightly struck out. The purpose of the child care legislation was to establish an administrative system designed to promote the social welfare
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of the community and within that system very difficult decisions had to be taken, often on the basis of inadequate and disputed facts, whether to split the family in order to protect the child. In that context and having regard to the fact that the discharge of the statutory duty depended on the subjective judgment of the local authority, the legislation was inconsistent with any parliamentary intention to create a private cause of action against those responsible for carrying out the difficult functions under the legislation if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties (see p. 361 j, p. 363 a b, p. 378 f to p. 379 d h and p. 400 h, post).

(5) In the education cases, the claims based on breach of statutory duty had also been rightly struck out. A local education authority's obligation under s. 8 of the 1944 Act to provide sufficient schools for pupils within its area could not give rise to a claim for breach of statutory duty based on a failure to provide any or any proper schooling since the Act did not impose any obligation on a local education authority to accept a child for education in one of its schools, and the fact that breaches of duties under the Education Acts might give rise to successful public law claims for a declaration or an injunction did not show that there was a corresponding private law right to damages for breach of statutory duty. In the case of children with special educational needs, although they were members of a limited class for whose protection the statutory provisions were enacted, there was nothing in either the 1944 Act or the 1981 Act which demonstrated a parliamentary intention to give that class a statutory right of action for damages. The duty imposed on a local education authority under s. 8(2)(c) of the 1944 Act to 'have regard' to the need for securing special treatment for children in need of such treatment left too much to be decided by the authority to indicate that Parliament intended to confer a private right of action and the involvement of parents at every stage of the decision-making process under the 1981 Act and their rights of appeal against the authority's decisions showed that Parliament did not intend, in addition, to confer a right to sue for damages (see p. 361 j, p. 363 a b, p. 397 d e h j, p. 398 d f to p. 399 a and p. 400 h, post); *dicta* of Scrutton LJ in *Gateshead Union v. Durham CC* [1918] 1 Ch 146 and of Lord Denning MR in *Meade v. Haringey London Borough* [1979] 2 All ER 1016 at 1024-1025 disapproved.

(6) In respect of the claims for breach of duty of care in both the abuse and education cases, assuming that a local authority's duty to take reasonable care in relation to the protection and education of children did not involve unjusticiable policy questions or decisions which were not within the ambit of the local authority's statutory discretion, it would

- a* nevertheless not be just and reasonable to impose a common law duty of care on the authority in all the circumstances. Courts should be extremely reluctant to impose a common law duty of care in the exercise of discretionary powers or duties conferred by Parliament for social welfare purposes. In the abuse cases a common law duty of care would be contrary to the whole statutory system set up for the protection of children at risk, which required the joint involvement of many other agencies and persons connected with the child, as well as the local authority, and would impinge on the delicate nature of the decisions which had to be made in child abuse cases and, in the education cases, administrative failures were best dealt with by the statutory appeals procedure rather than by litigation (see p 361 j, p 363 a b, p 380 j to p 381 d f to p 382 d g, p 391 f g j, p 392 f to h, p 399 e and p 400 h, post).
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- (7) A local authority was not vicariously liable for the actions of social workers and psychiatrists instructed by it to report on children who were suspected of being sexually abused because it would not be just and reasonable to impose a duty of care on the local authority or (per Lord Nolan) it would be contrary to public policy to do so. The social workers and psychiatrists themselves were retained by the local authority to advise the local authority, not the plaintiffs and (Lord Nolan dissenting) by accepting the instructions of the local authority did not assume any general professional duty of care to the plaintiff children. Their duty was to advise the local authority in relation to the well-being of the plaintiffs but not to advise or treat the plaintiffs and, furthermore, it would not be just and reasonable to impose a common law duty of care on them. However (Lord Nolan concurring), in the education cases a local authority was under a duty of care in respect of the service in the form of psychological advice which was offered to the public since, by offering such a service, it was under a duty of care to those using the service to exercise care in its conduct. Likewise, educational psychologists and other members of the staff of an education authority, including teachers, owed a duty to use reasonable professional skill and care in the assessment and determination of a child's educational needs and the authority was vicariously liable for any breach of such duties by their employees (see p. 361 j, p. 363 a b, p. 383 f to h, p. 384 c g h, p. 392 h to p. 393 c e to g, p. 395 g to p. 396 a and p. 400 c h, post).
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- (8) It followed that the plaintiffs in the abuse cases had no private law claim in damages. Their appeals would therefore be dismissed. In the education cases the authorities were under no liability at common law for the negligent exercise of the statutory discretions conferred on them by the 1944 and 1981 Acts but could be liable, both directly and vicariously,
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for negligent advice given by their professional employees. The education authorities' appeals would therefore be allowed to the extent that the claims based on an alleged duty of care in the exercise of the statutory discretions would be struck out but otherwise the appeals and cross-appeals would be dismissed (see p 361 j, p 363 a b, p 393 j, p 396 e, p. 400 g and p. 401 a, post).

On the strength of these authorities, the answer to the question posed would be in the negative.

Was The Statutory Duty Fulfilled?

Even if Suhakam is said to owe the plaintiff an enforceable statutory duty, which in my considered view that cannot be the case, yet I must say that that statutory duty had been fulfilled. It is part and parcel of my judgment that the defendants have inquired into PRIM's complaint and have acted reasonably in doing so. The affidavit of Kamaruddin bin Mohamed Baria in encl. 5 systematically itemised the defendants' conduct and it would be ideal to refer to that affidavit. I can do no better than to reproduce para. 14 to para. 26 of encl. 5 whose contents are food for thought for everyone to digest:

14. After receiving the Memorandum from PRIM on 30.03.01, the 1st Defendant considered the matter in great detail. At a meeting of the 1st Defendant held on 09.04.01, the 1st Defendant decided *inter alia* as follows:

14.1 A public inquiry was not necessary at that time as several Government agencies were already involved in investigating the incident.

14.2 The 1st Defendant would contact the Government agencies concerned to find out what actions had been, and would be, taken by them regarding the incident.

14.3 The 1st Defendant would refer the complaints set out in PRIM's Memorandum to the relevant agencies, asking to be furnished with the findings of their investigations into the incident.

15. By a letter dated 13.04.01, the 1st Defendant notified PRIM of its aforesaid decision. A copy of the said letter is annexed hereto and marked as Exhibit 'KB-1'.

16. By a letter dated 30.06.01, the 1st Defendant notified the Department of National Unity with regard to the incident and requested that a copy of the Department's investigation report be furnished to assist the 1st Defendant to make a decision. A copy of the said letter is annexed hereto and marked as Exhibit 'KB-2'.

- a* 17. The 1st Defendant issued a similar letter, also dated 30.06.01, to the Department of Social Welfare. A copy of the said letter is annexed hereto and marked as Exhibit 'KB-3'.
- b* 18. By a letter dated 17.07.01 to PRIM, the 1st Defendant requested PRIM to assist the 1st Defendant by obtaining affidavits from the victims, their family members and other witnesses regarding the Kampung Medan incident. A copy of the said letter is annexed hereto and marked as Exhibit 'KB-4'. However, PRIM refused to assist in this regard.
- c* 19. By letter dated 30.07.01 to the Selangor Chief of Police, the 1st Defendant requested the Police to comment on the complaints made by various parties and advise the 1st Defendant of any action taken in respect of the police reports lodged by the Indian community in connection with the incident. A copy of the said letter is annexed hereto and marked as Exhibit 'KB-5'.
- d* 20. On 05.10.01, the 1st Defendant received a report from the Police in respect of the Kampung Medan incident as requested. A copy of the covering letter dated 29.09.01 from the Police is annexed hereto and marked as Exhibit 'KB-6'.
- e* 21. On 06.11.01, the 1st Defendant received a report from the Ministry of National Unity and Social Development as requested. A copy of the covering letter dated 26.10.01 from the Ministry is annexed hereto and marked as Exhibit 'KB-7'.
- f* 22. Notwithstanding the reports received, on 19.11.01 the 1st Defendant directed its investigating officers to interview some of the victims of the Kampung Medan incident. To date, the 1st Defendant's officers have interviewed 5 individuals, consisting of 4 victims of the Kampung Medan incident (one of whom had not lodged a police report) and the wife of one of the victims:
- 22.1 On 27.11.01 the 1st Defendant's officers interviewed Vasu a/l Vello, one of the victims.
- g* 22.2 On 29.11.01 the 1st Defendant's officers interviewed Kanabathi a/l Yellapan, one of the victims who had not lodged a police report.
- 22.3 On 09.01.02 the 1st Defendant's officers interviewed Nirmala a/p Anjan, the wife of one of the victims.
- h* 22.4 On 14.01.02 the 1st Defendant's officers interviewed Parthiban a/l Peremala, a victim.
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22.5 On 14.01.02 the 1st Defendant's officers interviewed Thinakaran a/l Rajagopal, a victim. a

23. The 1st Defendant is still investigating and considering this matter, and has not yet reached a decision. Hence, I am advised by the Defendants' Solicitors and verily believe that the Originating Summons is premature. b

24. I am advised by the Defendants' Solicitors and verily believe that based on the aforesaid events, it is obvious that none of the Defendants have breached the Act and the Constitution, and that the Defendants have at all material times acted in good faith. The Defendants accordingly deny all allegations to the contrary contained in the Plaintiff's Affidavit. c

25. In the circumstances, I am advised by the Defendants' Solicitors and verily believe that the Plaintiff cannot institute this action in view of Section 18(1) of the Act. d

26. In the premises, I respectfully pray for an Order in terms of the Defendants' application." e

All these demonstrate that the plaintiff's originating summons in encl. (1) was filed prematurely and that Suhakam is still investigating the matter.

Has The Alleged Breach Of Statutory Duty Caused Injury To The Plaintiff?

The fact of the matter is this. That the averments in encl. 2 at paras. 20 to 21, 23 to 24, 26 to 27, 29 to 30 together with the exhibits marked as "S2" and "S3" that were annexed to encl. 2 showed that the plaintiff's complaint was entirely based on the criminal acts that occurred in Kampung Medan and the alleged acts and omissions of the police in respect of the same. I must say, at once, that the defendants cannot be faulted. The defendants cannot be held responsible for those criminal acts and the alleged non action by the police. f

For these reasons, I must strike out prayers (3), (4) and (5) of encl. (1) summarily.

The Unworkability Of Prayer (2) Of Enclosure (1)

As reproduced earlier, prayer (2) of encl. (1) is in the nature of a mandatory injunction and I am of the view that it cannot be granted for the following reasons: g

(a) it is vague and unworkable and it merely requires the defendants to immediately comply with ss. 4, 12 and Part III of the Act; and h

(b) it overlooks the crucial fact that the tenure of office of the second defendant (Tan Sri Musa Hitam), the fourth defendant (Tan Sri Anuar Zainal Abidin) i

- a* and the sixth defendant (Professor Mehrun Siraj) had ended on 24 April 2002 and that they are no longer members of Suhakam. So these personalities who have made their exits cannot be compelled to perform those tasks which the Act does not authorise them to do.

b **Carry Out The Functions In Good Faith – Section 18(1) Of The Act**

I have reproduced this section in the early part of this judgment and I must say this. That the sequence of events as alluded to in the affidavits showed beyond question that the defendants have collectively acted in good faith at all material times and that the plaintiff's allegations of bad faith are entirely baseless.

c **Inadmissible Evidence In Support Of Enclosure (1)**

Enclosure 2, an affidavit in support of encl. (1), should not be considered by this court because it contained hearsay statements in contravention of O. 41 r. 5(1) of the RHC which states as follows:

- d* Subject to Order 14 rules 2 (2) and 4 (2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

I say so because a perusal of encl. 2 would show that the allegations contained therein are premised on the following factors:

- e* (a) newspaper reports (see exhs. "S2" and "S6" of encl. 2);
- (b) documents issued by third parties (see exhs. "S1" to "S4", and "S5" of encl. 2);
- f* (c) the words or actions of third parties as exemplified in paras. 3, 6, 9 to 11, 13, 16 to 18, 22 to 27, 29 to 33, and 38 to 39 of encl. 2; and
- (d) mere speculations as alluded to in paras. 3 to 5, 7, 9 to 11, 13 to 16, 18 to 21, 24, 34 to 38 and 40 to 44 of encl. 2.
- g* No amount of submission can alter the blunt fact that the plaintiff's allegations in encl. 2 are not based on facts within the plaintiff's own knowledge. Accordingly, it is part and parcel of my judgment that there is no evidence to support the originating summons in encl. (1). The plaintiff's averment at para. 9 of encl. 2 shows the admission on the part of the plaintiff that his application is entirely based on his own assumptions and analysis of the information furnished by the members of the public especially from the residents of Kampung Medan and its surrounding areas as well as from the victims of Kampung Medan, the NGO's (non governmental organisations) and the political
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parties. Not being a victim of the Kampung Medan incident, the plaintiff is not in a position to depose to facts within his own knowledge. In short, the plaintiff could not depose to what had actually happened at Kampung Medan and this must surely affect his originating summons in encl. (1). The illuminating judgment of Faiza Thamby Chik J in *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180 on hearsay evidence is worth reading. The following authorities should also be referred to:

- (a) *Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997, FC;
- (b) *Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54, HC; and
- (c) *Pacific Inter-Link Sdn Bhd v. Pemilik Kapal Atau Vesel 'MAKATSARIJA'* [2000] 2 CLJ 679.

The value of newspaper reports relied upon by the plaintiff in encl. 2 cannot assist the plaintiff in his originating summons in encl. (1). The newspaper reports are inadmissible. They are hearsay. In this regard, the speech of Abdul Hamid Omar CJ (Malaya) (who later rose to be the Lord President) in *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64 must be referred to. There, his Lordship in style said at p. 65 to p. 66 of the report:

Court's observation

Before I consider the grounds, I would, in passing, observe that the sole foundation of the Originating Summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on July 27, 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.

I would also observe that there seems to be a flaw in the plaintiff's case in that it is common knowledge, the Sultan invariably speaks in Bahasa Malaysia and in that event the press reports of what the Sultan is alleged to have said would therefore have been a translation thereto. If so, who did the translation and was it accurate? Where is the translator's affidavit affirming the accuracy of the contents of the translation? In the absence of such an affidavit, the press reports would clearly be inadmissible.

Without the press reports, what other evidence is there to show what the Sultan said on the occasion concerned? In my view, therefore, the Originating Summons founded upon such premises may be held to be groundless. The

- a* judgment I am about to pronounce, however, is not founded upon such premises.

In the same vein, reference to the following two cases should also be made:

- b* (a) *Dato' Mak Kok & Anor. v. See Keng Leong & 9 Ors* [1990] 1 CLJ 71; [1990] 1 CLJ (Rep) 790; and
(b) *Raja Segaran a/l Krishnan v. Bar Malaysia & Ors* [2000] 4 CLJ 847.

Striking Out Under Enclosure 4

- c* In its present form, encl. (1) is obviously unsustainable and it ought to be struck out with costs (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, SC, and *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550). Enclosure 4 must succeed, in any event.

Conclusion

- d* For the reasons adumbrated above, I hereby dismiss the plaintiff's procedural objection with costs. I too grant prayers (1) and (4) as amended of encl. 4.

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